United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1124

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

-vs-

Docket No. 77-1124

JOSEPH S. WILLIAMS,

Defendant-Appellant

Appellants Brief

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STATEMENT OF THE CASE

JOSEPH WILLIAMS, Defendant-Appellant herein, was indicted for one count of possession of stolen mail, in Violation of 18 U.S.C. Section 1708, and one count of uttering or publishing a forged government check, in Violation of 18 U.S.C. Section 495. After a Jury Trial, Defendant was convicted on December 22, 1976, of Count 2 of the indictment, uttering or publishing a forged government check in violation of of 18 U.S.C. Section 495, and acquitted of Count 1 of the indictment, possession of stolen mail. On March 7, 1977, Defendant was sentenced by the Hon. JOHN C. CURTIN to the custody of the Attorney General for a period of one and one-half years. Defendant-Appellant is currently released upon bail pending the within Appeal.

FACTS

Defendant-Appellant was charged with possession of government mail and uttering or publishing a forged government check, in that on May 15, 1976, Mr. Williams was in possession of a Federal Income Tax refund check issued to one ELAR PARKER, and further that on May 15, 1976, Defendant-Appellant took this check to a store in Buffalo, New York by the name of Riverside Men's Shop and purchased various merchandise, paying for this merchandise by signing the name Elar Parker on the back of Mr. Parker's check

and giving it to the store in payment of such merchandise.

At trial the government began presenting virtually unconverted proof that a Federal Income Tax refund check was mailed on Friday, May 14, 1976 from Philadelphia, Pennsylvania to Elar Parker at his address on 1650 Genesee Street, Buffalo, New York. This proof, of course, established that the Treasury Check actually was placed in the United States mail system, an essential element in the charge of possession of stolen mail.

Next, the Prosecution placed Elar Parker on the witness stand, who testified that he was expecting a tax refund check from the United States Government and that he never received such a check. He further stated that he never gave Joseph Williams or anyone else permission to possess or cash his tax refund check and that he did not know Mr. Williams. Again, this proof was virtually uncontroverted by the Defense.

The Prosecution then proceeded to call several witnesses from the Riverside Men's Shop and a witness from the Marine Midland Bank. The people from Riverside Men's Shop testified that a man who identified himself as Elar Parker appeared in that store on May 15, 1976 and purchased some wearing apparel with a Treasury check made payable to Elar Parker and further that the person received cash for the difference between the amount of the purchase and the amount of the check. Two of the people called

from Riverside Men's Shop to testify about the transaction were the salesmen, Mr. Richard D. Wells, who served the customer, and the manager, Mr. Neil Ehrenreich, who approved the cashing of the checking of the check. Neither of these people could identify Mr. Williams during the trial as the person who came in the store, but both said they had identified his picture shortly after the occurrence. Mr. Wells, who had the most contact with the person who cashed the stolen check, described the person who cashed the check as about 5 feet, 10 inches tall and between 220 and 230 pounds. He said the man had black hair and he did not notice anything unusual about the customer's hair. Mr. Williams, is 5 feet, 7 1/2 inches tall and has an extremely noticeable streak of gray hair, both in the identification photograph examined by Mr. Wells and as he sat at the Defense table in Court. Mr. Ehrenreich, the store manager could not identify Mr. Williams either, and he said that he could only identify the photograph given to him shortly after the transaction occurred. He did not remember anything unusual about the appearance of the customer. The third witness called from Riverside Men's Shop was Patricia Grace who said that she was working the following Monday, on May 17, 1976 after the check had been cashed and a man came in and requested a refund of money for some of the goods purchased the previous Saturday. She somewhat tentatively identified Mr. Williams as the man in the shop

that Monday, and did identify the photograph of Mr. Williams that she had been shown shortly after May 17, 1976.

Basically, this is the proof connecting Mr. Williams to the 2nd Count of the indictment, the crime of uttering or publishing a forged government check.

There was one essential part of the above testimony which was controverted by the Defense and that related to the question of identification. The Defense, during the trial, did not bring into issue the question of whether this event, as described by the witnesses above mentioned, ever occurred. That was conceded. The Defense had no doubt someone did what the witnesses from the Riverside Men's Shop said. Possession by someone of the check was not questioned and uttering the check by someone was not questioned or controverted in any way by the Defense. The only issue raised was that of identification. The question of whether Mr. Williams was the person in the store at the Riverside Men's Shop on the day in question was presented to the jury.

Next, the Prosecution put Irene Benson on the witness stand. Her testimony related to the actual theft of the check from the mailbox of Elar Parker and connected Joseph Williams to possession of the stolen check. Mrs. Benson testified that she overheard a conversation between her Brother, James Ridgeway,

the Defendant-Appellant herein, and an individual by the name of "Banks". Mrs. Benson testified that she overheard these individuals talking about cashing an income tax return check of Elar Parker. She also testified that she saw this check in the hands of Joseph Williams. However, her testimony was contradicted not only by herself, and the Defense, but was also contradicted by her Brother who testified later. Her Brother, James Ridgeway, testified that his Sister, Irene Benson, in fact stole Elar Parker's check out of the mailbox and gave it to her Brother to find someone to cash the check. He then testified that he called up a friend a his, who came over to his home along with Joseph Williams and they all went to the Riverside Men's Shop, at which time Joseph Williams went into the Riverside Men's Shop to have the check cashed. He testified that upon their return, he gave his Sister $10.00 and also received $10.00 from Joseph Williams, but that his Sister felt that this was not enough money for taking the check, and therefore his Sister reported this incident to the authorities. It is eminently clear from reading the testimony, that their testimony was contradicted not only by the Defendant, but they actually contradicted each other, making their testimony something not believable.

The Prosecution also presented a witness from the Marine

Midland Bank, who testified that this check in fact went through his banking system and also presented a witness who testified as to the appearance of Joseph Williams at his arraignment, and to the fact that Mr. Williams appeared to be of a heavier built at the time Mr. Williams was arraigned.

The Defense presented two witnesses, the Defendant and a friend of the Defendant. Both witnesses stated that on May 15, 1976 at the time the offense allegedly occurred, Joseph Wiliams was at a birthday party at Robert Pitts' house. Also, the Prosecution was allowed, over the objection of the Defense, to attack the Defendant-Appellant's credibility by questioning the Defendant concerning his prior criminal record. However, neither witness was controverted at all by the Prosecution through any rebuttal witness and this completed the testimony at the trial.

ISSUES PRESENTED

I. Did the Court err to the Defendant's prejudice in allowing the Prosecution to elicit the Defendant-Appellant's prior criminal record ?

II. Was the jury's verdict so inconsistant and against the weight of the evidence presented that it cannot stand as a matter of law?

ARGUMENT

I. The Court erred in allowing the Prosecution to illicit the Defendant-Appellant's prior criminal record in front of the jury.

Mr. Williams had been convicted, through pleas of guilty, on May 27, 1968 of the charge of attempted forgery in the 3rd Degree, and also on June 16, 1975, of possession of stolen mail, United States Treasury check. Prior to putting the Defendant on the witness stand, the Defense Attorney made a motion to the Court that a United States Attorney should not be allowed to attack the credibility of the Defendant by bringing out the Defendant's prior criminal record as to these two charges, in that any probative value that bringing these two charges to the attention of the jury might have, would be far overweighed by the prejudice that would inure to the Defendant because of the similarity in nature of these prior charges and the charges in the instant case. This motion was denied by the Court. Due to the fact that this motion was denied, the Defense Attorney in his direct examination brought these two prior charges to the attention of the jury. Nevertheless, upon cross-examination, the following testimony was illicited:

"Q. Now, Mr. Williams, on May 27, 1968, pursuant to your plea of guilty, you were convicted of attempted forgery in the 3rd Degree, were you not?

A. Yes, I were.

Q. And, Mr. Williams, on June 15, 1975, in this Court, in this very Courtroom, you again pleaded guilty to another offense and were then convicted of possession of stolen mail, United State Treasury Check, is that not correct?

A. That is correct, I was. "

[pp. 315-316, Trial Transcript]

Moreover, in the United States Attorney's summation to the jury, this prior criminal record was again highlighted. At page 356 of trial transcript, the United States Attorney stated:

"Mr. Williams is a man who admitted that he had been convicted on two separate occasions during the last 8 years, felonies: one involving attempted forgery or a particular document."

The Court:

"Just a minute, Mr. Burns. The only reason, ladies and gentlemen, and I will get to this in the charge, the only reason the testimony was admitted was that under the law it may have something to do with credibility. It cannot be considered by you as direct evidence that he had any involvement with these checks. You may weigh it only as to whether or not he is a person that you can believe, and simply that."

Mr. Burns:

"Yes. I hope, - I certainly don't want to leave any other impression in your mind either. I am stressing these convictions for this purpose, or

> bringing it to your attention; here is a man who has been convicted of attempted forgery and on another occasion, possession of a U.S. Treasury check stolen from the mails in 1975. I am bringing these to your attention so that you can determine for yourself whether or not Mr. Williams himself is a believable witness. Now, both of these offenses involved deceit and dishonesty. I urge you, ladies and gentlemen, that a person who has admitted being deceitful and a person who has admitted being dishonest on prior occasions by pleading guilty to certain crimes a a much less believable, much less credible witness on the stand than are the other witnesses in the case such as Mr. Ridgeway who has not been impeached in any manner by any conviction of any crimes, and also Mrs. Benson, ..."

It is the Appellant's contention herein, that even though a limiting instruction was immediately presented to the jury, and even though such limiting instruction was also included in the Court's charge, the manner in which such prior criminal record was presented, and the fact that such criminal record was so similar to the crimes charged could have no other possible effect upon the jury then to allow the jury to use such prior criminal actions as proof of Defendant's guilt to the crimes charged, to the Defendant's dire prejudice.

It is repeatedly been held in this Circuit, other Circuits, and in New York State, that reference to a Defendant's criminal record is always highly prejudicial United States ex. rel. Bleimehl v. Cannon, 525 F. 2nd 414 [7 Cir. 1975]: United States v. Puco, 453 F. 2nd 539 [2nd Cir. 1971]; United States v. Carter, 482 F. 2nd 738 [D.C. Cir. 1973]: United States v. Semensohn, 421 F. 2nd 1206 [2nd Cir. 1970]: People v. Sandoval, 34 N.Y. 2nd

371, 357 N.Y.S. 2nd 849 [1974]; People v. Rayes, 48 A.D. 2nd 632,368 N.Y.S 2nd 198 [1st Dept. 1975]; People v. Mallard, 78 Misc. 2nd 858, 358 N.Y.S. 2nd 913 [Sup. Ct. 1974].

In United States v. Puco, Supra. Judge Tinker stated for the Court:

> "Reference to a Defendant's criminal is always highly prejudicial. The average jury is unable, despite curative instructions, to limit the influence of the Defendant's criminal record to the issues of credibility. See F. Burton v. United States, 391 U.S. 123,129 [1968]. The potential for prejudice, moreover, is greatly enhanced where, as here, the prior offense is similar to the one for which the Defendant is on trial." 453 F. 2nd at 542.

In the recent case of the United States v. Cox, 536 F. 2nd 65 [2nd Cir. 1976], Judge Gewin, developed the considerations to be looked into prior to questioning about a Defendant's prior record. He stated:

> "Moreover, the critical consideration in determining whether other crimes evidenced is admissable is whether the probative value in proscutorial need for such evidence outweighs it potential for prejudicing the jury." 536 F. 2nd at 71.

It cannot be denied that a prior criminal record based upon the same or similar type of charges as a Defendant is currently being tried upon, would always be extremely prejudicial. A jury

might always tend to consider the prior criminal activity as proof of the Defendant's inclination to commit the crime for which he stood charge. In the case of the United States v. Carter, is an example of just such a case.

In Carter, the Defendant was convicted of robbery. In that case, the United States Attorney illicited evidence from the Defendant that he had been convicted previously of six counts of robbery and assault, in an attempt to attack the credibility of the Defendant. Even though limiting instructions were presented to the jury, the Court overturned the Defendant's conviction stating that "Even when the prior criminal record is brought into the evidence in an appropriate manner, there is the well-nigh inescapable prejudice on the issue of guilt notwithstanding the trial court carefully instructs the jury as to the limited consideration it may accord the evidence."

In the instant case, the fact that the Defendant's prior criminal convictions to forgery in the 3rd Degree in uttering a forged Treasury check, in the manner in which this evidence was presented to the jury in that the U.S. Attorney explicity stated that Appellant had been convicted of the uttering charge in this very Courtroom, would have the same kind of prejudice

and would lead to the same "inescapable" conclusions that led the Courts in the above cited cases to reverse those Defendant's convictions. It is not surprising that the jury in the instant case acquitted the Defendant of possession, but convicted the Defendant-Appellant of the charge of uttering and publishing, the same charge for which the Defendant had previously been convicted. It is respectfully submitted, that by presenting these prior convictions to the jury, the jury's minds were prejudice against the Defendant, and that these prior acts of criminal conduct entered into the jury's deliberations as to whether or not the Defendant was guilty of the instant crime.

II. The jury's verdict were so inconsistent on the law and the facts and against the weight of the evidence, that the verdict should not stand.

In the instant case, as previously mentioned, the jury acquitted the Defendant of the crime of possession of the stolen Internal Revenue refund check, but convicted the Defendant of publishing and uttering the same check. Such conviction took place only after the jury came back with the acquittal on the 1st Count, and after an Allen charge was delivered to the jury and they again deliberated the next day. The elements in both counts of the indictment include both

possession of the check, since of course an individual cannot utter and publish a check if it was not possessed by him, and also knowledge that the check was in fact stolen. Therefore, as a matter of law, an individual could not utter and publish a check if he did not possess it. By acquitting the Defendant of the possession charge, the jury must have believed that either the Defendant did not possess the check, and if that be the case, as a matter of law the Defendant could not have been convicted of uttering and publishing the check, or the jury must have believed that the Defendant did not have knowledge that the check was stolen, and again, would have to have acquitted the Defendant of the publishing and uttering charge. Given the facts presented to the jury, their verdict can mean that Joseph Williams did not possess stolen mail, or that he did not know that the mail was stolen. The conclusion could not mean that he possessed the check that was not mailed because the proof concerning the check being mailed was uncontroverted.

Defendant-Appellant is frank to admit that in most cases consistency in jury verdicts are not necessary. Hamling v. United States, 418 U.S. 87,94 S. Ct. 2887 reh. den. 95 S. Ct. 157 [1974]. However, just as clearly, there are exceptions to this general rule. For example, where the inconsistency

develops between a special finding and a general verdict of a jury, a reversal might be required. Pipefitters Local Union #562 v. United States, 95 S. Ct. 2247, 2256-57 [1972]. Likewise, where a jury's verdict is inconsistant with each other as a matter of law, Courts have not hesitated to reverse the Defendant's conviction. See, e.g., Fuller v. United States, 407 F. 2nd 1199 [2.C. Cir. Enbank, 1968] cert. den. 393 U.S. 1120, 89 S. Ct. 999 [1968]; United States v. Bethea, 483 F. 2nd 1024 [4th Cir. 1973] Aff. without Op. after remand, 506 F. 2nd 1398, cert. den. 420 U.S. 978, 95 S. Ct. 1905 [1973].

In the United States v. Bethea, Supra, the Defendant was charged with one count of failing to report for induction, one count of failing to keep his local draft board advised of his current address, and one count of failure to report for nonservices physical examination. The jury convicted the Defendant on all counts. However, the Court pointed out that Appellant's guilt or innocence on all the counts depended upon the jury's resolution of whether or not the Defendant received the notices sent to him by the draft board. If the Defendant has received the notices, that is conviction of the count of failing to keep the draft board informed of his address could not stand and i the Defendant had not received the notices, then the Defendant could not convicted of failing to report for

induction or failure to report for nonservices physical examination. Therefore, the jury could not convict on all counts, since the proof involved could not logically point to conviction on all three counts.

It is respectfully submitted, that as in Bethea, an acquittal in the instant case on the possession count could not logically stand with a conviction on the uttering and publishing count of the within indictment. For that reason, it is respectfully submitted that the Defendant's conviction must be reversed.

CONCLUSION

FOR THE FOREGOING REASONS, IT IS RESPECTFULLY REQUESTED THAT THE DEFENDANT-APPELLANT'S CONVICTION BE REVERSED.

Respectfully submitted,

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